# No. 12,324

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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AUDREY CUTTING and SYLVIA A. HENDERSON,

*Appellants,*

vs.

RAY BULLERDICK, et al.,

*Appellees.*

## BRIEF FOR APPELLEES.

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## BRIEF FOR APPELLEES.

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### STATEMENT OF FACTS.

On or about the 30th day of November, 1946 Ralph R. Thomas, defendant in the Court below, executed a deed to the premises which have been foreclosed by the judgment from which the appeal is taken, to appellant, Sylvia A. Henderson, the minor daughter of appellant, Audrey Cutting, and about sixteen years of age. The negotiations were conducted by Audrey Cutting assuming to act as her daughter's guardian. According to her testimony the purchase price of the property was $1800.00 of which she paid $300.00 cash, and some days later gave a note signed by Sylvia A. Henderson and herself, for the balance of $1500.00.

The deed was not delivered at the time of its execution, but with or without a written escrow agreement, was placed in escrow in the Union Bank of Anchorage, Alaska, together with the note, where both remained until shortly before the 4th day of August, 1948 when the balance then due on the note was paid, the deed delivered, and recorded on said date.

On April 30, 1948 the building contract was entered into between Russell W. Smith and Audrey Cutting which is set forth on pages 3, 4, 5, and 6 of appellants' brief.

In the contract Audrey Cutting represents herself as owner but in her amended answer to complaint in intervention filed February 8, 1949 she alleges that she entered into this contract for herself and for and on behalf of Sylvia A. Henderson, a minor.

Audrey Cutting acquired possession of the premises about the middle of July, 1948 and rented them continuously for the rental of $150.00 a month from that time until sometime after the 8th of April, 1949.

The contract price, $9800.00, for the erection of the residence was not paid. The contractor claimed the sum of $700.00 in addition to the contract price for extra work. Audrey Cutting conceded that there was $200.00 due for extra work, so that there was a disagreement to the extent of $500.00.

Russell Smith, the contractor, did not demand the sum of $13,500.00 as stated in appellants' brief but did demand the sum of $10,500.00.

At all events, nothing was paid on the contract and no amount offered or tendered by Audrey Cutting. The laborers and materialmen acquired liens against the property which they have foreclosed in the manner provided by law and been granted judgment to the amount of their respective claims.

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**ARGUMENT.**

In this action the appellees claimed liens on the premises involved by virtue of the following provisions of the Alaska Code:

> "Sec. 26-1-1. ACLA 1949. Persons entitled to lien for work or labor done or materials furnished. Every mechanic, artisan, machinist, contractor, lumber merchant, laborer, teamster, drayman, and other persons performing labor upon or furnishing material of any kind to be used in the construction, alteration or repair, either in whole or in part, of any building, wharf, bridge, flume, fence, machinery or aqueduct, or any structure or superstructure, shall have a lien upon the same for the work or labor done or material furnished at the instance of the owner of the building or other improvement, or his agent. (CLA 1913, sec. 691; am L 1933, ch. 118, sec. 1, p. 241; CLA 1933, sec. 1982.)"

To this section should be added section 26-1-14, which, in the Compilation of 1933 was inadvertently omitted, which is as follows:

> "Sec. 26-1-14. Persons deemed agent of owner of building or other improvement. Every con-

tractor, subcontractor, architect, builder, or other person having charge of the construction, alteration or repair, in whole or in part, of any building or other improvement as provided in sections 1982 and 1983 (Secs. 26-1-1 and 26-1-8 herein), shall be held to be the agent of the owner for the purposes of this Article (Secs. 26-1-1-26-1-14 herein). (Added, L 1935, ch. 28, sec. 1, p. 79.)"

"Sec. 26-1-2. Land or interest therein subject to lien: Mines: Rights of purchaser of improvement and leasehold. The land upon which any building or other improvement as aforesaid shall be constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof (to be determined by the judgment of the court at the time of the foreclosure of such lien), and the mine on which the labor was performed or for which the material was furnished shall also be subject to the liens created by this code if, at the time the work was commenced or the materials for the same had been commenced to be furnished, the land belonged to the person who caused the building or other improvement to be constructed, altered, or repaired; * * *".

"Sec. 26-1-4. Notice of non-responsibility. Every building or other improvement mentioned in section six hundred and ninety-one (sec. 26-1-1 herein), constructed upon any lands with the knowledge of the owner or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein; and

the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this code, unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration, or repair, give notice that he will not be responsible for the same, by posting a notice in writing to that effect in some conspicuous place upon the land, or upon the building or other improvement situated thereon. (CLA 1913, sec. 694; CLA 1933, sec. 1986.)''

In this argument the First and Second Points raised by appellants will be discussed together and are as follows:

FIRST POINT RAISED. That the trial Court erred in denying the motion of counsel for defendants to dismiss at the close of plaintiffs' case on the grounds that the complaints of the original plaintiffs and plaintiff intervenors did not state good causes of action against the defendants.

SECOND POINT RAISED. That the trial Court erred in denying the motion of defendants' counsel to strike the lien claims filed by plaintiffs and to dismiss at the close of plaintiffs' case on the grounds that the lien claims did not contain sufficient facts to constitute valid liens against the real property of Sylvia A. Henderson.

No motion was made by counsel for defendants at the close of plaintiffs' case. At the conclusion of the trial and after both sides had rested, counsel for de-

fendants moved to dismiss on the ground that the complaints failed to state a cause of action. (TR 558-559.)

As to the second point raised, no motion was made at any time during the trial of the case or thereafter to strike the lien claims filed by plaintiffs and no motion was made at the close of plaintiffs' case, or at any time, to dismiss on the grounds that the lien claims did not contain sufficient facts to constitute valid liens against the real property of Sylvia A. Henderson.

However, in the First Point raised, the complaints are attacked on the ground that they did not state good causes of action, in that,

First. The complaints did not properly allege the ownership of the property sought to be charged with the liens, and

Second. The complaints did not allege that the work and labor was done at the instance of the owner of the building or his agent. (Brief of Appellants, page 14.)

In the Second Point raised, the lien statements are attacked on the same grounds. (Brief of Appellants, page 17.)

In appellees' brief, the question of the allegation of ownership will be hereinafter discussed.

## CONTRACTUAL RELATION.

In substance, appellants' contention is that neither in the claims of lien nor the complaints in support thereof is there any allegation of a contractual relation between the lien claimants and the owner of the property sought to be charged with the lien; that such contractual relation must be alleged in both claims of lien and in the complaints.

While this contention is maintained against all the complaints and complaints in intervention involved in this appeal, in the brief of appellants the argument is directed only to the original complaints, Nos. A-5087 and A-5088. (TR 3-117.)

In each of these complaints and in each cause of action therein, Ralph R. Thomas is designated as the owner of the premises and it is alleged that the construction of the building was "with the *knowledge, consent and at the instance* (italics ours) of the defendant, Ralph R. Thomas". (In Case No. A-5088 the defendant, Thomas, is designated as "Ralph Russell Thomas".) (TR 4, Par. III; 119, Par. V; 122, Par. IV; 125, Par. IV.)

In each of the claims of lien attached to the complaint in case No. A-5088 appears the allegation "that the residence building now on said premises was constructed * * * with the knowledge and consent of the said Ralph Russell Thomas". (TR 130-132-134.)

So it appears that in case No. A-5088 the contractual relation between the owner and the lien claim-

ant is sufficiently stated in both claims of lien and complaints.

In case No. A-5087, however, in which Ray Bullerdick and five other carpenters and laborers join as plaintiffs, the lien claims do not directly allege the contractual relation between the lien claimants and the owner, Ralph R. Thomas, although the complaints do so allege.

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### ESSENTIALS OF LIEN STATEMENT.

The laws of Alaska provide, Section 26-1-5, Alaska Compiled Laws Annotated, 1949, as follows:

> "It shall be the duty of every original contractor, after the completion of his contract, and of every mechanic, artisan, machinist, builder, lumber merchant, laborer, or other person, claiming the benefit under this article, within 90 days after the completion of his contract, or the alteration or repair thereof, or after he has ceased to labor thereon from any cause, or after he has ceased to furnish materials therefor, to file with the recorder of the precinct in which such building or other improvement, or some part thereof, shall be situated, a claim containing a true statement of his demand, after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed or to whom he furnished the materials, and also a description of the property to be charged with the lien sufficient for identification, which claim shall be verified by

the oath of himself or of some other person having knowledge of the facts."

Thus, the statute provides that every lien claimant shall file for record within a specified time a claim containing:

1. A true statement of his demand, after deducting all just credits and offsets;

2. The name of the owner or reputed owner, if known;

3. The name of the person by whom he was employed or to whom he furnished the materials; and

4. A description of the property to be charged with the lien sufficient for identification.

The claim of lien of Ray Bullerdick in case No. A-5087 states, among other things, as follows:

1. That the lien is claimed on certain premises in the City of Anchorage, Alaska, describing them, together with the building thereon situated;

2. That the lien is claimed for certain labor performed on said premises in the construction of a building thereon, detailing when the work was performed, the number of hours labor and agreed wage, and the amount owing claimant after deducting all just credits and offsets;

3. That the owners and reputed owners of said premises are Ralph Russell Thomas and Audrey Cutting; and

4. That the claimant was employed by Russell W. Smith to perform said services at the agreed wage above mentioned.

The foregoing is a literal compliance with the terms of the statute as to all four essential averments required.

In case No. A-5087 five other laborers and carpenters joined in the action with Ray Bullerdick; and in their complaints adopt all of the allegations of the Bullerdick complaint which are common to all their causes of action and then set forth their particular claims and all of their claims of lien and complaints in support thereof are identical in form with that of the plaintiff, Bullerdick. (TR 3-26.)

In attacking the sufficiency of these complaints, counsel for appellants relies solely upon *Russell v. Hayner,* 130 Fed. 90, but arrives at a mistaken conclusion as to what was actually decided in that case, which was, in effect, that a contractual relation between the owner of the building and the lien claimant must be alleged in the complaint. The case does not hold that this contractual relation must be alleged in the lien statement but holds as follows:

> "It does not appear from the complaint that the owners of the lot had any knowledge of the contract made by Hayner with appellants for the construction of the building, or that it was constructed at their instance. In order to bring the case within the provision of Section 265 of the Alaska Code (now 26-1-4 ACLA, 1949) it was

> necessary for the appellants to have alleged in the *complaint or lien* (italics ours) that the building was constructed upon the land 'with the knowledge of the owner or the person having or claiming any interest therein', for it is only in such cases that this section provides that it shall be held to have been constructed 'at the instance of such owner or person or persons having or claiming any interest therein' unless the owner gives the notice therein prescribed and this notice is not required to be given until after the owner shall have obtained knowledge of the construction of the building."

Furthermore, the opinion in *Russell v. Hayner* further states, 130 Fed. 94:

> "The fact is that appellants were given the opportunity to amend their complaint, and, if there were any material facts which would show knowledge on the part of the owners of the lot, etc. they should have amended their complaint to show such facts to the court".

Thus, indicating that any failure to establish the contractual relation between the lien claimant and the owner could have been remedied by an amendment of the complaint as stated above.

In *Russell v. Hayner,* supra, the Court cites *Cross v. Tscharnig,* 39 Pac. 540, in support of its decision and quotes that case as expressly holding:

> "That a mechanic's lien claim which states that the material was furnished to one person, and that the land was owned by another, but does not state

> that the material was furnished at the request of the owner is fatally defective."

This exact language is used in the syllabus to the opinion in *Cross v. Tscharnig* but nowhere appears in the opinion.

The opinion in *Cross v. Tscharnig* does state:

> "So we have here both the claim of lien and the complaint, which concurrently show that the materials were furnished at the instance of a person other than the owner of a building, to-wit: Kasper Tscharnig. There exists no statement or allegation anywhere, *either in the claim of lien or in the complaint* (italics ours) that H. W. Ross, the owner of the building, caused the materials to be furnished or that the same, or any part thereof, were furnished at his instance or request * * * It would seem therefore, that the complaint is insufficient to support the liens in this respect."

So that in both *Russell v. Hayner* and *Cross v. Tscharnig,* supra, the demurrers to the complaint are sustained on the ground that in neither complaint or lien statements is any contractual relation alleged between the owner and the lien claimant.

Furthermore, the weight of authority supports the view that such contractual relation need not be alleged in the lien statement provided it is alleged in the complaint. The lien statute of Alaska is taken almost in toto from the Oregon statute. Hills Annotated Code, Section 3673.

*Cross v. Tscharnig,* supra, is an Oregon case. The opinion was written by Judge Wolverton, who wrote the opinion in *Osborne v. Logus,* 42 Pac. 997, and in the latter case carefully reviews the authorities and concludes, page 1001:

> "The object of the statute is to provide a ready and available means whereby contractors, subcontractors, and materialmen may secure themselves for labor done or material furnished in the construction and repair of buildings and other structures, and at the same time to furnish the owner with a reasonable notice, so that he may deal with contractors to whom he is personally liable accordingly.
>
> Whether the person for whom the labor is done or to whom the materials were furnished was an agent under this statute or had authority to bind the owner and entitle the laborer and materialmen to a lien is a matter of pleading and proof at the trial."

Among other authorities cited by Judge Wolverton as sustaining this interpretation is *Lumber Company v. Gottschalk,* 22 Pac. 860 (California case) in which the Court states on page 862 of the opinion:

> "There is nothing in the section or any other that requires the materialman to state in his claim of lien what relation the person to whom he furnished the material bore to the owner—whether contractor or agent. Nor does the burden of determining whether any contract made or attempted to be made by the owner or the contractor was valid or not rest on him when he comes to file his lien. He must state the facts re-

> quired by statute. Whether the person to whom he furnished the material had authority to bind the owner and entitle the materialman to a lien is a matter of pleading and proof at the trial."

The Supreme Court of the United States in *Springer Land Ass'n. v. Ford,* 168 U.S., page 525; 18 Supreme Court Reporter, 175, affirming a New Mexico case, reported in 41 Pac. 541, approves the above language.

In *Drake Lumber Co. v. Lindquist* (another Oregon case decided in 1946), 170 Pac. (2d) 712, the Court states on page 719 (11):

> "Our statute (Sec. 67-105 O.C.L.A.) unlike the statutes of many states does not require that the contractual relations existing between the lien claimant and the owner shall be stated in the notice of lien." (Citing *Osborne v. Logus,* supra, and *Collins v. Heckart,* 270 Pac. 907 (Ore case).)

In the latter case, discussing this precise question, the Court states, page 910:

> In some jurisdictions the statute requires that the contract be described in the notice. Our statute, however, makes no such requirement. It prescribes the necessary elements to be set out in a claim of lien and this court has time and again held that it is unnecessary to set out in the notice anymore than the statute itself requires." Citing *Osborne v. Logus,* supra, and other Oregon cases.

The brief of appellants does not discuss the pleadings and lien claims of the intervening plaintiffs and

defendants, the argument being directed only to the complaints in the original suits.

The intervenors concerned are:

1. Kennedy Hardware (Complaint, TR 181—Claim of Lien, TR 187).

2. Ken Hinchey Company (Complaint, TR 45—Claim of Lien, TR 58).

3. Wolfe Hardware and Furniture (Cross-Complaint, TR 200—Claim of Lien, TR 214).

4. Anchorage Sand and Gravel, including an assigned claim of Cinder Concrete Products Company (Complaint, TR 163—Claims of Lien, TR 176-178).

5. Ketchikan Spruce Mills and Alaska Plumbing and Heating Company, joining in one action (Complaint, TR 152—Claims of Lien, TR 150-161).

In the Kennedy Hardware case the complaint alleges, "that said construction was with the knowledge, consent and at the instance of the defendants, Audrey Cutting and Ralph Russell Thomas" (TR 183, Par. VI), and in the claim of lien it is alleged, "the residence building was constructed with the knowledge and consent of the said Russell Thomas". (TR 188.)

In Ken Hinchey Company, the claim of lien states, "that the residence building now on said premises was constructed with the full knowledge and consent of the said Ralph Russell Thomas". (TR 59.) This claim of lien is attached to the complaint and made a part thereof. (TR 54, 55, Par. XXI.)

In Wolfe Hardware and Furniture, likewise, the claim of lien contains the same allegation as that of the Ken Hinchey Company and is made a part of the complaint. (TR 210, Par. XXI—TR 215.)

Both the complaints and claims of lien in these three cases last discussed certainly meet the objections of the appellants as to the allegation of contractual relation.

Anchorage Sand & Gravel and Cinder Concrete Products Company:

In this case, as in the original case, No. A-5087, the claim of lien does not directly allege the contractual relation between the lien claimant and the alleged owner, Ralph Russell Thomas.

The claim of lien, however, does clearly set forth all the four essentials hereinbefore enumerated as required by the Alaska Statute. (TR 176-178.)

Also, the complaint in this action does not directly allege the contractual relation, but this omission is remedied by the order of the Court made at the conclusion of the case permitting the pleadings of intervenors to be amended "to the effect that the work done and materials supplied were done and supplied at the instance of the owner and record owner, Ralph R. Thomas". (Supplemental TR, page 582.)

Ketchikan Spruce Mills, Inc. and Alaska Plumbing and Heating Company, Inc.:

In this action, as in the last previous action discussed, the claims of lien substantially set forth the

four essential averments heretofore enumerated, as essential in a claim of lien; any omission in the complaint to allege the contractual relation between the lien claimants and the owner of the property sought to be charged is cured by the order of the Court permitting the amendment above quoted.

Also, at the conclusion of the trial, on motion of counsel for Ketchikan Spruce Mills, the notice of lien of that claimant was amended to include the name of Ralph Russell Thomas as an owner or reputed owner. This amendment was allowable by virtue of the provisions of Section 26-9-5, ACLA, 1949.

From the foregoing it appears that in all the claims involved the lien claims set forth the four essentials required by statute.

That in all complaints, either originally or by proper amendment, the contractual relation between the lien claimant and owner of the property sought to be charged with the lien is alleged.

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**ALLEGATION OF OWNERSHIP.**

On this point appellants again rely solely on *Russell v. Hayner,* 130 Fed. 92, where the Court comments as follows:

> "There is no direct averment in the complaint, nor any positive statement in the lien, as to the owner of the building",

and intimates, but does not decide, that the complaint may be defective on account of this omission.

In the present case no such question arises. All of the liens are claimed against both the building and the land, and the allegation of ownership is directed to both.

In original cases A-5087 and A-5088 the lien claims allege that Ralph Russell Thomas and Audrey Cutting are the "owners and reputed owners". Likewise, in the Kennedy Hardware Intervention.

In Anchorage Sand and Gravel Co. and Cinder Concrete Products Co. Audrey Cutting and Ralph Russell Thomas are named as "owners or reputed owners".

In Wolfe Hardware and Furniture and Ken Hinchey Co. Ralph Russell Thomas is named as owner or reputed owner.

In Alaska Plumbing and Heating Co., Inc., Audrey Cutting, Russell Smith, and Ralph Russell Thomas are named as owners or reputed owners.

In Ketchikan Spruce Mills, Inc., Audrey Cutting, Russell Smith and Sylvia A. Henderson are named as "owners or reputed owners", and the name of Ralph Russell Thomas was later added by amendment. (TR 572.) This under authority of Sec. 26-9-5, ACLA, 1949.

In *Ford v. Springer Land Ass'n,* 41 Pac. 545, supra, a claim of lien naming certain persons as "owners or reputed owners" is upheld, and the Supreme Court sustains this holding in *Springer Land Ass'n v. Ford,* stating:

> "The names of the owners or reputed owners of the lands, and their connection with the transac-

> tion, are stated with sufficient clearness". (168 U.S. 525, 18 Sup. Court Rep. 175.

A mechanic's lien, under the Alaska law, is acquired by the labor done or material furnished, not by filing the claim for record.

The filing is for the purpose of securing and perpetuating the lien, and is designed to give notice to all the world, including owners, incumbrancers, and purchasers, that a lien is claimed against the property.

Here the evidence showed that Ralph Russell Thomas was the record owner of the premises until August 4, 1948, long after the liens had been acquired, and Audrey Cutting was the reputed owner and had taken possession of and was receiving rents for the property in July, 1948.

Both were named as defendants in the title to all the lien claims filed.

The property was designated by legal description in all claims.

The liens were all claimed against both land and building.

All essential averments of claims of lien are clearly stated, and no one interested in examining the record could be misled.

As stated by Chief Justice Fuller in *Ford v. Springer Land Ass'n,* supra:

> "Although mechanics' liens are the creation of statute, the legislation being remedial should be so construed as to effect its object.

Substantial compliance, in good faith, with the requirements of the particular law is sufficient, and the 'test of such compliance is to be found in the statute itself' ". 168 U.S. 524, 18 Sup. Ct. Rep. 174.

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**THIRD AND TENTH POINTS RAISED.**

THIRD POINT RAISED. That the trial Court erred in denying the motion of defendants' counsel to dismiss against the defendant, Audrey Cutting, on the grounds that she was neither owner of the property nor agent of the owner, Sylvia A. Henderson.

There was no motion made by defendants' counsel to dismiss against the defendant, Audrey Cutting, on the grounds above stated.

TENTH POINT RAISED. That the trial Court erred in rendering personal judgment against the defendant, Audrey Cutting, who was neither owner nor agent of the owner of said real property.

In discussing this point counsel for appellants makes the misstatement, on page 18 of appellants' brief, "that sole title to the property was vested in Sylvia A. Henderson, a minor, during and at all times referred to in the complaint and thereafter". This contention is at variance with the testimony and findings of the Court but is nevertheless persistently repeated throughout the brief of appellants.

Audrey Cutting is made a defendant in all the Complaints and Complaints in Intervention by virtue of

the third subdivision of Section 26-1-13, ACLA, 1949, which reads as follows:

> "Parties: Conformity to mortgage foreclosure proceedings. In all actions to enforce any lien created by this chapter (Secs. 26-1-1-26-1-14 herein) all persons personally liable and all lien holders whose claims have been filed for record under the provisions of section six hundred and ninety-five (Sec. 26-1-5 herein) shall, and all other persons interested in the matter in controversy or in the property sought to be charged with the lien may be made parties, but such as are not made parties shall not be bound by such proceedings. The proceedings upon the foreclosure of the liens created by this code shall be, as nearly as possible, made to conform to the proceedings of a foreclosure of a mortgage lien upon real property. (CLA 1913, Sec. 699; CLA 1933, Sec. 1994.)"

The procedure for the foreclosure of mortgages and other liens on real property is prescribed in Section 56-1-31 and Section 56-1-34, ACLA, 1949 which are as follows:

> Sec. 56-1-31: "A lien upon real property other than that of a judgment, whether created by mortgage or otherwise, shall be foreclosed, and the property adjudged to be sold to satisfy the debt secured thereby, by an action of an equitable nature. In such action, in addition to the judgment of foreclosure and sale, if it appears that a promissory note or other personal obligation for the payment of the debt has been given by the mortgagor or other lien debtor, or by any other person

as principal or otherwise, the court shall also adjudge a recovery of the amount of such debt against such person or persons, as the case may be, as in the case of any ordinary judgment for the recovery of money. (CLA 1913, Sec. 122; CLA 1933, Sec. 3897.)"

Sec. 56-1-34: "The judgment may be enforced by execution as an ordinary judgment for the recovery of money, except as in this section otherwise or specially provided:

* * * * * * *

Second: When the judgment is also against the defendants or any one of them in person, and the proceeds of the sale of the property upon which the lien is foreclosed is not sufficient to satisfy the judgment as to the sum remaining unsatisfied to either, the judgment may be enforced by execution as in ordinary cases. When in such case the judgment is in favor of different persons not united in interest, it shall be deemed a separate judgment as to such persons, and may be enforced accordingly. (CLA 1913, Sec. 1224; CLA 1933, Sec. 3900.)"

The Court found from the evidence in this case that the Anchorage Sand and Gravel Company acquired a lien upon the premises involved in the sum of Three Hundred Seventy-seven and 61/100 Dollars ($377.61) and that the Ketchikan Spruce Mills, Inc. acquired a lien against said premises in the sum of Two Thousand Seven Hundred Seventeen and 86/100 Dollars ($2,717.86) and that both liens were for labor or materials furnished in the construction of the building

at the request of the defendant, Audrey Cutting, and that both claimants are entitled to judgments for said amount against the defendant, Audrey Cutting, and judgment was rendered accordingly.

The pleadings of the intervenors above named were amended by order of the Court "to the effect that the work done and the materials supplied were done and supplied at the instance of the owner and record owner, Ralph R. Thomas".

The Court found that the proof sustained this allegation and also that the proof sustained the allegation in the intervenors' complaints that the labor done and material furnished was at the request of Audrey Cutting. Consequently, the judgment against her for the amount of the respective liens above referred to was proper and in accordance with the findings of the Court.

In the *Russell v. Hayner* case, supra, again relied upon by counsel, the Court held that the cause of action for foreclosure failed because the complaint did not state a cause of action, which left the personal action standing alone, independent of the proceedings in equity to foreclose the lien. In this situation the Court in the *Hayner* case relegated the plaintiff to an action at law to recover the personal judgment, although the above-quoted Alaska statute seems to indicate that a contrary cause might have been pursued.

In the present case, however, no such situation exists, the liens have been upheld and foreclosed and the

personal judgment against the defendant, Audrey Cutting, allowed as clearly provided by statute.

FOURTH POINT RAISED. That the trial Court erred in amending *sua sponte* and by judgment the pleadings of plaintiffs to contain other essential allegations not previously set forth therein.

SIXTH POINT RAISED. That the trial Court erred in amending *sua sponte* and by judgment the complaints of the plaintiffs sufficient to make good cause of action.

What is meant by the phrase, "and by judgment", in the foregoing statement of points is not understood by counsel for appellees. There were no pleadings amended by judgment.

The pleadings in the original cases Nos. A-5087 and A-5088 were not amended in the respects indicated by brief of appellants, nor at all. Nor does the brief of appellants state the amendment allowed, and complained of which was clearly stated in the supplemental transcript of record, page 582, as follows:

> "The pleadings filed on behalf of plaintiffs are in all respects adequate. The other pleadings filed on behalf of certain intervenors may be considered as amended to conform with the proof. Those amendments so far as the intervenors' pleadings are concerned, are to the effect that the work done and materials supplied were done and supplied at the instance of the then and record owner, Ralph R. Thomas. That averment, or one equivalent to it, is contained in the original complaints in

each action and it will be considered that any of the defendants may have denied that averment".

The pleadings affected by this amendment were the Complaints in Intervention of the Ketchikan Spruce Mills, Inc. and Alaska Plumbing and Heating Company (TR 152) and the Anchorage Sand and Gravel Company. (TR 163.)

The answer of Audrey Cutting to the complaints in the original cases, A-5087 and A-5088, contains the following allegation:

> "Admits that she is the owner of that certain real property situate in the City of Anchorage, Alaska and more particularly described as: Lot Two (2) in Block Thirty-seven D (37-D) of the South Addition to the City of Anchorage, Alaska, according to the official map and plat thereof on file in the office of the Recorder for the Precinct of Anchorage, Third Division, Territory of Alaska." (TR 27, 138.)

These answers were sworn to by Audrey Cutting and filed September 9, 1948 and stood as her answers until February 14, 1949 and February 18, 1949.

In the meantime, the Complaints in Intervention which the Court allowed to be considered amended were filed respectivly, on November 9th and November 12, 1948, at which time the original answers of Audrey Cutting, in which she admitted ownership of the subject property, were her only pleadings on file, and it was her repudiation of this allegation in the said subsequent amended pleadings which made neces-

sary the amendments of intervenors' pleadings of which she, through her counsel, now complains.

Had she not repudiated her admitted ownership of the premises in controversy the intervenors' complaints would have stated a cause of action without amendment.

The brief of appellants on the above points again invokes the standards of pleading set forth in *Russell v. Hayner, supra* (Brief of Appellants 22) but overlooks the fact that the opinion in that case, 130 Fed. 94, states:

> "That fact is that appellants were given the opportunity to amend their Complaints and if there were any material facts that would show knowledge on the part of the owner of the lot, etc. they should have amended their complaint so as to properly present such facts to the Court".

In the *Hayner* case the amendment was not made necessary by any act of the defendant, but in the present case it was the defendant, Audrey Cutting's, repudiation of her own sworn answer which made the amendment necessary and proper.

FIFTH POINT RAISED. That the trial Court erred in amending the plaintiffs' pleading *sua sponte* and by judgment to include defendant, Sylvia A. Henderson, as a party defendant.

In his argument on this point counsel for appellants quotes the statement of the Court appearing in the supplemental transcript, page 583 (Appellants' Brief 24), and states that in the language quoted,

"The Court erroneously makes Sylvia A. Henderson a defendant and amends all of the pleadings to show that Sylvia A. Henderson claims some title or interest in the property adverse to the plaintiffs and intervenors".

In the second amended answer hereinbefore referred to filed February 14, 1949 counsel for appellants assumes to appear for the defendants, Audrey Cutting and Sylvia A. Henderson, and there appears in said answer for the first time in any pleading of the defendant the allegation in which sole ownership of the premises in controversy is alleged to be in Sylvia A. Henderson. (TR 61, Par. II 62.)

Also on February 18, 1949 after the trial was concluded counsel for appellants filed a third amended answer in which counsel again assumes to appear for both defendants and again alleges the sole ownership of the premises to be in Sylvia A. Henderson and also denies any ownership in the defendant, Audrey Cutting. (TR 65, 66.) It was to meet these new allegations contained in pleadings filed late during the trial that the Court permitted the amendments of which the appellants complain.

The plaintiffs in the original cases, A-5087 and A-5088 met these amended answers by reply alleging substantially what the Court permitted by the amendment of which counsel for appellants now complains. (TR 68, 69.)

All the other intervenors met the allegation of sole ownership in Sylvia A. Henderson by their respective

replies to the amended complaints in which they deny this allegation. (TR 67, 70, 63, 219.)

Consequently, there could not possibly have been any error in the action of the Court in permitting the amendment in this cause.

Sylvia A. Henderson was not made a defendant by the amendment referred to on page 24 of appellants' brief but was referred to as a defendant for the reason that some of intervenors' pleadings had referred to her as a defendant and because in the amended answers filed by counsel during the trial and after the trial counsel for appellants designated her a defendant and assumed to appear for her as attorney.

As to the question of including Sylvia A. Henderson as a party defendant in the judgment, that also was brought about by the act of counsel for appellants in assuming to appear for Sylvia A. Henderson and filing the amended pleadings alleging sole ownership of the premises in controversy in Sylvia A. Henderson. Whether the judgment of the Court on the case is binding on Sylvia A. Henderson is the subject of argument on other points raised by appellants and this question will be fully discussed in answering the argument of appellants on those points.

EIGHTH POINT RAISED. That the trial Court erred in allowing the lien claims against the real property of an infant, the said Sylvia A. Henderson, and

NINTH POINT RAISED. That the trial Court erred in ordering sold, by its judgment, the real property of Sylvia A. Henderson, a minor.

The argument of counsel for appellants on the Eighth and Ninth Points raised is based on the following proposition stated on page 28 of appellants' brief, as follows:

> "There can be no mechanic's lien upon the lands of a minor, for he can make no contract which is binding upon himself or his property * * * even if there be a contract with his guardian for erecting a building upon a minor's property, no lien is conferred if the guardian had no authority in law to make the contract."

And on the following stated on page 29 of the appellants' brief:

> "Where a mechanic performs work upon the property of a minor under a contract with the guardian the mechanic's lien cannot be enforced where the guardian has not obtained an order of the court authorizing her to do the work."

The appellants contend that the two above propositions have no bearing upon the right of the Court to allow and foreclose the liens involved in this case.

The contention of the appellees is that the liens allowed and foreclosed in this case were not allowed and foreclosed against the property of a minor.

None of the argument or authorities cited by counsel for appellants on these points is relevant to the question involved.

It is conceded that at the time the liens were acquired by the claimants that the deed of the property from Ralph R. Thomas to Sylvia A. Henderson was

not recorded. The only question involved on the point under discussion is the construction of Section 26-1-3, ACLA, 1949. The part of said section which is pertinent is as follows:

> "A lien created by this code upon any parcel of land shall be preferred to any lien, mortgage or other incumbrance which may have attached to the land subsequent to the time when the building or other improvement was commenced, or the materials were commenced to be furnished or placed upon or adjacent to the land; also to any lien, mortgage or other incumbrance which was unrecorded at the time when the building, structure, or other improvement was commenced, etc."

It is the construction of the word "incumbrance" in the above statute that is material in determining the right of the Court to foreclose the liens against, not the property of Sylvia A. Henderson, a minor, but against the property described in the lien claims on which the liens were acquired before Sylvia A. Henderson recorded her deed.

The section above quoted is in the nature of a recording act. It extends its protection to persons who have furnished labor or material in the construction of buildings or other improvements as against unrecorded mortgages or other incumbrances. It cannot be contended that if Sylvia A. Henderson had acquired a mortgage on the premises in dispute and failed to record it until after a lien had been acquired against the mortgaged property that she would not have been subject to the operation of the above quoted

statute for it must be conceded that the recording acts apply to all persons, infants as well as others.

In discussing this question under the Fourteenth Point raised, with reference to which it has no relation, the counsel for appellants cites a long array of definitions of the word "incumbrance" taken from Bouvier's Law Dictionary (Appellants' Brief 65, 66) and counsel argues that in view of these definitions the Alaska Legislature did not intend that the phrase "and other incumbrances" was to include a deed. No case can be cited which limits the meaning of the word "incumbrance" to the definitions quoted by counsel. On the contrary, every case that counsel for appellees has been able to find construes the term "incumbrance" in connection with mechanic's lien laws as including a deed or conveyance.

The Supreme Court of Kansas in construing a statute very similar to the statute of Alaska states:

> "Mechanic's Lien—Priority—and Other Incumbrances—Deeds.
>
> "Under the provisions of Article 27 c. 80, Comp. Laws, 1879, the lien of a mechanic or materialman for work done or material furnished has preference to 'all other liens and incumbrances' which may attach to or upon the lands or buildings subsequent to the commencement of the building or the making of the repairs, or the furnishing of the material; and the words of the statute 'all other liens and incumbrances' also embraces conveyances". *Warden v. Sabins,* 12 Pac. 520. (Syllabus by the Court.)

The statute above referred to is substantially the same as the first part of the statute of Alaska heretofore in the argument on this point quoted. The statute of Kansas did not include the provision of the Alaska law referring to prior and unrecorded incumbrances but the meaning of the word in each case would necessarily be the same.

In the opinion in the Kansas case the Court states, page 522:

> "The word 'incumbrance' is a broader term than 'lien', and yet, when the statute of Indiana only provided that 'liens created' shall relate to the time when the person furnishing materials began to furnish the same, and shall have priority over all liens suffered or created thereafter, etc., the Supreme Court of that state decided the lien of the mechanic related to the time when the work commenced, or the materials began to be furnished, as to 'subsequent conveyances' as well as to other liens". *Fleming v. Bumgarner,* 29 Ind. 424.
>
> "The same question was before the Indiana Court in Kellenberger v. Boyer, 37 Ind. 188. The Court followed the decision in Fleming v. Bumgarner, and said the 'construction given to the statute in that case would not extend the operation of the act beyond its evident spirit and the legislative intention' (and the Kansas case continues) 'An incumbrancer is one who has a legal claim upon an estate, and the purchaser of premises under a conveyance is the holder of the legal estate. *An absolute conveyance is an incumbrance in the fullest sense of the term.*" (Italics ours.)

"We do not think, therefore, that the preference given to the lien contractor or materialman which operates 'over all liens and incumbrances' is confined solely to subsequent liens or mortgages but also embraces 'conveyances'. In adopting this rule no injustice is done to the purchaser as the work itself or the material furnished is notice to all of the mechanic's or materialman's claims."

In the present case the statute involved relates both to the land and buildings, both prior and subsequent to the commencement of the construction, but the correct interpretation of the term "incumbrance" in the foregoing decision is equally applicable to both.

"In Section 5480 it is provided: That 'the lien for the things aforesaid' or work shall attach to the buildings, erections or improvements for which they are furnished or done, in preference to any prior lien or incumbrance or mortgage upon the land upon which the same are put'. 'Incumbrance' is here evidently used in its enlarged sense if of legal title to the land." *Pinkerton v. LeBeau,* 54 NW 99, 3 S. Dak. 440.

"A paramount outstanding title is an 'incumbrance' within the meaning of a covenant against incumbrancers." *Morris v. Short,* 151 SW 639.

"Materialman's Lien. Such lien is superior to the lien or rights of an incumbrancer which includes a person who purchased the land between the time the building was commenced and the furnishing of the material." *Sherbondy v. Tulsa Boiler and Machinery Co.,* 226 Pac. 566.

> "A conveyance is to be regarded as an 'incumbrance' ". *Continental Supply Company v. White,* 12 Pac. (2d) 569.

In *Bloom on the Law of Mechanic's Liens,* Sec. 490, page 449, appears the following:

> "It will be noticed that the provisions of Section 1186 do not expressly mention grants and conveyances of real property, but, under the general principles of priorities, which have their enunciation in the Civil Code, it is thought that these liens take precedence over subsequent 'grants' and 'conveyances', and also over prior unrecorded grants and conveyances, although the section expressly refers only to 'liens, mortgages, and other encumbrances'."

The decisions and authorities above cited and quoted are all exactly in point as regards the interpretation of the word "incumbrance" as used in connection with priorities and mechanic's lien laws and diligent search has failed to disclose to counsel for appellees, any case to the contrary.

Section 22-3-25, ACLA 1949, is as follows:

> "Every conveyance of real property within the Territory hereafter made which shall not be filed for record as provided in this chapter shall be void against any subsequent innocent purchaser in good faith and for a valuable consideration of the same real property or any portion thereof, whose conveyance shall be first duly recorded."

No one would contend that this section is not applicable to a minor or infant. Appellees contend that whatever interest Sylvia A. Henderson, a minor, may have owned in the premises in controversy by virtue of having an unrecorded deed at the time the lien claims were acquired was at the time of the commencement of the work or furnishing of materials inferior to the interest of the lien claimants, that as against lien claimants to the extent of the amount of their lien claims she had no interest. That her interest was void as against the lien claimants just as an unrecorded deed in her hands would have been void against an innocent purchaser for value whose deed was first recorded. That regardless of counsel's contention that a lien claimant is not an innocent purchaser for value in the sense of the general recording act above quoted that nevertheless, to all intents and purposes, a lien claimant stands in the position of an innocent purchaser with respect to a deed unrecorded at the time he acquires his lien. If this were not true then any person could defeat the spirit and intention of the mechanic's lien law by purchasing property in the name of an infant daughter, keep the conveyance secret, and after procuring the construction of valuable buildings on the premises and by subsequently recording the secret instrument, defeat the claims of all laborers and materialmen and escape all personal responsibility, a result which the evidence in this case seems to indicate is precisely what the defendant, Audrey Cutting, is attempting to accomplish.

Under the provisions of Section 26-1-3 ACLA, 1949 hereinbefore set forth, a mechanic's lien claim when filed relates back and takes effect from the time of the commencement of the work done or materials furnished. It has been assumed in this argument that at the time the liens of the claimants were acquired Sylvia A. Henderson had an unrecorded deed to the premises in controversy. The appellees do not concede this to be a fact, but on the contrary, contend the deed in question had not even been delivered to Sylvia Henderson until at least several weeks after the residence building had been completed.

This question of the time of delivery of the deed is raised by counsel for appellants by his Fourteenth Point raised and as this question may have some relevancy to the point now under discussion it will next be discussed in this brief.

FOURTEENTH POINT RAISED. That the trial Court erred in finding against the evidence that there was no delivery of the deed of the real property from Ralph Thomas to Sylvia A. Henderson, and

FIFTEENTH POINT RAISED. That the trial Court erred in finding against the evidence, that Sylvia A. Henderson did not execute a mortgage to Ralph Thomas on said real property.

As the argument on the Fourteenth Point involves a discussion of the evidence and as the evidence on this point consists wholly of the testimony of the

defendant, Audrey Cutting, appellees will at this point insert portions of the testimony of Audrey Cutting, together with some comments of counsel for appellees, relevant to this issue, and also other parts of her testimony which will assist this Court in determining how much credence, if any, should be attached to any of her uncorroborated testimony.

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EXTRACTS FROM TESTIMONY OF AUDREY CUTTING.

On February 8, 1949 Audrey Henderson Cutting was called as a witness by the plaintiffs. Her attention was called to the contract between herself and Russell W. Smith which is set forth in full on pages 3 to 6 of the brief of appellants and she testified as follows:

"Q. (by Mr. Grigsby). I want to ask you Mrs. Cutting, this contract purporting to be signed on the 30th day of April, were you at that time the owner?

A. It would depend on how you would look at it. I bought the lot for my minor daughter, as the guardian I would be the owner.

Q. But in dealing with the various people, including this contractor, Smith, and the people who furnished materials for that building did you represent yourself as owner?

A. I was representing both myself and my daughter.

Q. Prior to the construction of that building did you apply for a building permit from the City?

A. I believe Mr. Smith applied for the building permit.

Q. You have seen it?

A. Yes.

Q. You were designated as owner?

A. That is correct.

Q. You were at that time the reputed owner as far as the job was concerned?

A. Yes.

Q. But your daughter was the real owner?

A. That is correct and I was her guardian.

Q. And in your answer you state in paragraph I—you admit that you are the owner of certain real property situated in Anchorage, Alaska, and particularly described as: Lot 2 in Block 37-D, South Addition of the Original Townsite of Anchorage?

A. That is true.

Q. And for all purposes you were what is considered as the owner of the property?

A. That is correct." (TR 254-255.)

"Q. (by Mr. Kay). Mrs. Cutting, in paying for this lot did you pay for it on a so-called real estate contract?

A. Yes.

Q. That was a contract with Ralph Russell Thomas?

A. That is correct.

Q. Do you have a copy of that contract?

A. I believe there is a copy in the Union Bank.

Q. Was the deed placed in escrow in connection with that contract?

A. That is correct.

Q. Could you state whether that is a contract between you and Mr. Thomas or how was it?

A. The contract was between my daughter and Mr. Thomas.

Q. And was it signed by you?

A. No.

Q. It is your testimony that a deed is placed in the Union Bank. Do you have a copy?

A. No, I do not." (RT 255.)

On February 9th called as a witness by her counsel Audrey Cutting testified among other things:

"Q. You had had some dealings in connection with Lot number 2 in Block 37-D, South Addition to the Original Townsite of Anchorage and you had entered into a contract previously to purchase that lot?

A. Yes.

Q. Did you enter into that personally or was it with Sylvia Henderson?

A. I can't remember. It seems that it was with her.

* * * * * * *

Q. Was there a deed executed at the time the contract was made?

A. That is correct. The deed was in escrow and put with the bank.

Q. Which bank?

A. Union Bank.

Q. You made the payments?

A. Yes.

* * * * * * *

Q. You made the payments then without default?

A. Yes.

Q. Was there a default clause?

A. Yes.

Q. What did it provide?

A. It said that in case of default the lot would go back to the original owner.

* * * * * * *

Q. Mrs. Cutting, do you recall the date you completed payment for the property?

A. The contract was paid in full on approximately July 1, 1948.

Q. *You then received delivery of the deed?* (Italics ours.)

A. That is correct.

Q. In whose name is the deed?

A. Sylvia A. Henderson.

* * * * * * *

Q. You have the deed?

A. Yes, I do.

Q. Do you recognize it as a deed which was placed in escrow and executed at the time of the contract?

A. Yes.

Q. Was that deed ever recorded?

A. The deed was recorded on August 4, 1948 at two twenty P.M.

Q. Who recorded the deed?

A. Rose Walsh.

Q. You delivered the deed for recording?

A. I did.

Q. It was done at your request?

A. That is correct.

Q. Had you previously received this deed from the bank?

A. Yes, sir. (TR 339-342.)

Up to this point Audrey Cutting has testified positively and without hesitation both when examined by her own counsel and plaintiffs' counsel that acting as guardian for her minor daughter she made a contract with Ralph R. Thomas for the purchase of a lot; that a deed was executed from Thomas to her daughter and that both the deed and contract were placed in escrow with the Union Bank; that the contract contained the usual forfeiture clause in case of default in payments, that in case of default in payments the lot was to go back to the owner.

Later in the case it seems to have dawned upon her that delivery of an instrument in escrow conveys no title and also that the time when the deed to Sylvia A. Henderson was delivered might be of some importance. At all events, on February 14th, after several days' recess, we find Audrey Cutting testifying as follows:

Q. (by Mr. Butcher). Now, Mrs. Cutting, you were not certain previously when you testified as to the manner of the acquisition of this property and you informed counsel and the Court that you would endeavor to make a search for the papers which were executed in connection with the case, other than the deed, were you successful in finding any papers?

A. Yes, I was.

Q. What did you find?

A. I found the note that was executed for $1500.00 and I found the copy of the mortgage.

Q. Copy of a mortgage? Did the finding of the copy of that mortgage refresh your memory as to what actually happened in connection with the purchase of that lot and if so, what?

A. Well, finding the copy of the mortgage made me realize that it wasn't a real estate contract so therefore it should be a note so I went through all my papers again and found the income tax receipts.

* * * * * * *

Q. I hand you this paper and ask you to tell me what it is if you know.

A. It is a copy of the mortgage.

Q. Mortgage between whom?

A. Between Sylvia A. Henderson and Ralph R. Thomas.

Q. And do you know what that mortgage was given for?

A. It was a mortgage on Lot 2, Block 37-D of the South Addition.

* * * * * * *

Q. Now was this mortgage executed after the deed was signed and delivered?

A. Well, as I recall they were executed both at the same time.

Q. What do you recall about the transaction and circumstances, if you can? Where did it occur and

what was the circumstances surrounding the signing of these papers and the issuance of the mortgage, if you remember?

A. Well, the deed was signed first and then the mortgage.

Q. The deed was signed first by Mr. Thomas?

A. Yes.

Q. Do you recall where it was signed?

A. It was signed in the law office of McCutcheon and Nesbett.

Q. And then this mortgage was prepared?

A. Yes.

Q. Who prepared the mortgage, if you recall?

A. Both Mr. McCutcheon and Nesbett." (TR 409-413.)

And after introduction in evidence of a purported unexecuted copy of a mortgage and the note for which it was supposed to have been given as security, Audrey Cutting proceeds to testtify as follows:

Q. (by Mr. Butcher). Now, Mrs. Cutting, I believe you said that this was drawn up for you in the office of McCutcheon and Nesbett?

A. Yes, sir.

Q. And it was signed in that office?

A. Yes, sir.

Q. And it was notarized in that office?

A. Yes, sir.

Q. And prior to the signing of this mortgage do you recall whether the deed was delivered to Sylvia Henderson or not?

A. Yes, but all of the papers were left in escrow in the bank.

(Comment: This does not seem to suit counsel for appellants as appears by the next question.)

Q. Well, you answer my question. In the McCutcheon office was there a delivery made of the deed?

(Objection and objection overruled.)

Q. (by Mr. Butcher). When these papers were executed in the McCutcheon law office was there a delivery of the deed to Sylvia Henderson?

A. Where was.

(Comment: Which answer is completely satisfactory.)

Q. And following that I believe you testified that Sylvia Henderson executed this mortgage?

A. Yes, sir.

Q. And she signed this?

A. Yes, sir.

Q. And she signed the note?

A. Yes, sir.

Q. And then who took possession of the papers?

A. Well, I don't just recall. They were left in Mr. McCutcheon's office.

Q. And do you know what happened to them after that?

A. They were put in the Union Bank for collection.

Q. And they remained there until the note was paid off?

A. Yes, sir.

Q. And then you received all the papers?

A. Yes, sir.

Q. And do you recall whether you received the original mortgage or not?

A. They said they gave me all of the papers that were in the file so I naturally took it for granted that I had the original mortgage." (TR 420-421.)

* * * * * * *

Cross-Examination by Mr. Grigsby.

Q. (by Mr. Grigsby.) Mrs. Cutting, now with reference to this transaction, acting for Sylvia Henderson you arranged with Ralph R. Thomas to buy this property for the sum of $1800.00?

A. Yes, sir.

Q. $300. down and the balance of payments of $50 per month?

A. Yes, sir.

Q. And you gave them a note for the balance of $1500?

A. And the mortgage.

Q. What is that?

A. And the mortgage.

Q. And a mortgage to secure that note and he gave you a deed?

A. Yes, sir.

Q. Now there was no escrow agreement?

A. No, sir.

Q. Was the deed and the mortgage both left at Mr. McCutcheon's office?

A. Yes, sir.

Q. Was the deed drawn in McCutcheon's office?

A. Yes, sir.

* * * * * * *

Q. You are the notary on the deed?

A. Yes, sir.

Q. And then the deed and the mortgage both were left in McCutcheon's office?

A. Yes, sir.

Q. Mr. Thomas was there at the time?

A. Yes, sir.

Q. It was the same day?

A. The mortgage was prepared the same day.

Q. As the deed and the note also?

A. Yes, sir.

Q. The note is dated December 4th?

A. Yes, sir.

Q. Which is several days after the date of the deed?

A. Yes, sir.

Q. All right, where was that prepared?

A. The note and the mortgage were prepared all in the same office.

Q. All right, now, the mortgage was dated the same day as the deed, you say, and it purports on the copy you have to be dated in November blank. When was it executed?

A. Well, the mortgage was executed after the deed was signed.

Q. The same day?

A. No.

Q. Well, you just now said it was the same day?

A. No, you asked me if it was prepared the same day.

Q. When was it executed?

A. I wouldn't know. It wasn't on the same day the deed was made.

Q. But was prepared on the same day?

A. Yes, sir.

Q. On November 30th?

A. Yes, sir.

Q. And when was it executed?

(No response.)

Q. What was the arrangement when you got this deed?

A. Well, the mortgage wasn't signed on the same day that the deed was signed. It was not but what day it was signed I wouldn't say for sure. The note says December 4th so I assume the mortgage was signed the same day.

Q. Now, what was the arrangement when you got this deed as to the payment for the property as to whether it would be escrow or a mortgage? Was an arrangement made then that a mortgage would be made?

A. Well, after the deed was signed, yes, there was arrangements made about the mortgage and where it was to be paid.

Q. After the deed was signed?

A. Yes, sir.

Q. You didn't have any agreement before that?

A. No, sir.

Q. So Mr. Thomas just left you a deed—an absent (probably should be absolute) deed—without getting a mortgage or note or security whatever?

A. He left the deed with Mr. McCutcheon. He left it in Mr. McCutcheon's care until the mortgage was prepared. He was supposed to come back in and sign it but he didn't that day, so that is what accounts——

Q. He didn't sign the deed that day?

A. He signed the deed that day but not the mortgage.

Q. He came back subsequently and in the meantime the mortgage was signed by Sylvia Henderson?

A. Yes, sir.

Q. Well, did he come back and get it?

A. Well, he must have, I don't recall just what——

Q. He never did get it, did he? You said they were both left in the office?

A. Well, they were left in the office." (TR 427.)

* * * * * * *

"Q. Mrs. Cutting, you said this deed was delivered to Sylvia in McCutcheon's office?

A. That deed was left in McCutcheon's office, yes.

Q. You said it was delivered to Sylvia in McCutcheon's office?

A. Well, from the first you have got this all twisted up, Mr. Grigsby. I said the deed was left in McCutcheon's office. The mortgage was left in McCutcheon's office; the note was left in McCutcheon's office and Mr. McCutcheon made arrangements

with Mr. Thomas to leave the deed and the mortgage and the note in the Union Bank for collection.

Q. Then there was no delivery of the deed to Sylvia of the deed, is that right?

A. Well, it was signed. I don't know just what you mean by the word 'delivery', Mr. Grigsby.

Q. Was it handed her or you for her?

A. Well, Mr. McCutcheon was my attorney and I took it for granted it was delivered to her for it was delivered to him for safekeeping.

Q. There was no escrow agreement whatever?

A. No.

Q. When were you to get this deed and have the privilege of recording it? The property was mortgaged back to him. Couldn't you have recorded it any time you wanted to?

A. Yes, that is usually the form, the deed is usually recorded and the mortgage is recorded.

Q. But it wasn't done?

A. Evidently not.

Q. And you didn't get that deed at all from the bank until you paid this note, did you—when you paid the balance of this note on July 1st, 1946, you got the deed out of the bank, didn't you?

A. Yes, sir.

Q. And then you didn't record it until August 4th?

A. No. You see I sent a check to the bank—I was busy at the time—for the full amount. I called them up and they told me what the full amount was.

Q. What was the full amount?

A. Four and some—seven hundred dollars." (TR 424-429.)

* * * * * * *

From the foregoing it must be apparent that there was no delivery of the deed between vendor, Thomas, to Sylvia Henderson or to Audrey Cutting for Sylvia Henderson, or at all, until the purchase price had been paid in full, and that whether or not there was a mortgage, the deed, with or with an escrow agreement, was held in escrow by the bank until the balance of the purchase price was paid.

On February 10, 1949, Audrey Cutting testified as follows:

"Q. (by Mr. Kay). I believe there was some testimony as to who were the original parties to the contract. Who were these parties?

A. Between myself and Mr. Smith.

Q. Yourself and Mr. Thomas?

A. The original parties—I was not sure whether I had signed the contract or my daughter had signed the contract.

Q. Who were the parties to the purchase of the property?

A. Mr. Thomas and my daughter.

Q. You were not a party to that?

A. I wouldn't be sure.

Q. You are not certain as to whether you were a party to that contract?

A. No, I wouldn't be certain until I found the contract.

Q. You are certain that Sylvia Henderson is a party to that contract?

A. I wouldn't say that she was or wasn't.

Q. Is the deed to Sylvia Henderson?

A. Yes, sir.

Q. Was any deed ever prepared from Ralph Thomas to you?

A. Yes, sir.

Q. Certain?

A. Yes, sir.

Q. Positive?

A. Yes, sir." (TR 389-390.)

On Thursday, February 10, 1949, Audrey Cutting testified as follows:

"Q. (by Mr. McCarrey). I hand you a copy of the Anchorage News published last night and call your attention to the notice in which you state you are selling the whole of lot 2, block 37-D, in the South Addition in the near future. Did you cause that notice to be published?

Mr. Butcher. Objection.

The Court. Overruled.

Q. (by Mr. McCarrey). Is this the same property as is being litigated before the Court?

Mr. Butcher. Your Honor, the property is not being litigated.

Mr. McCarrey. I consider this very material, Your Honor, of material value as there are elements concerned. Furthermore the witness is guardian of Sylvia Henderson and I would like to inquire into the matter.

Mr. Butcher. I think this has nothing to do with the case.

Q. (by Mr. McCarrey). Is this notice the same lot on which the house that we have before the Court at issue is—that we have at issue before the Court?

A. Yes, it is.

Q. Are you the guardian of Sylvia Henderson?

A. Yes, sir.

Q. When were you so appointed guardian?

A. Just recently.

Q. January or February of this year?

A. I wouldn't be too positive as to the exact date.

Q. You would have to check?

A. Yes.

Q. Was it in December that you instituted proceedings to become guardian?

A. Yes, sir.

Q. Sometime subsequent then and in this year you were appointed guardian?

A. Yes, sir.

Q. For what purpose did you seek to be appointed guardian of Sylvia A. Henderson?

A. For the sale of lot in block 26-A of the South Addition, and the possibility of eventually or maybe selling the home on lot 2 in block 37-D of the South Addition.

Q. In what Court were you appointed guardian of Sylvia Henderson?

A. I was under the impression it was under the Court in Nome but I was mistaken so it was recently in the present Court I was appointed at Anchorage.

Q. Have you ever heretofore been appointed guardian?

A. I was given custody of her in Nome. I was under the impression at that time that that would also rule all guardianship matters.

Q. Then you never have been guardian before?

A. No, sir." (TR 396-397.)

On February 8, 1949 Audrey Cutting testified as follows:

Q. (by the Court). Did you ever tender any money to Mr. Smith in payment for his services under this contract?

A. No.

Q. Never gave him any money at all?

A. No.

Q. Did you ever offer to give him any money?

A. No.

Q. (by Mr. Grigsby). You have possession of those premises now?

A. That is right.

* * * * * * *

Q. You are getting the rent?

A. That is correct.

Q. (by the Court). When was the house first rented?

A. I believe that I actually didn't take possession until about the 15th day of July, 1948.

Q. Has it been rented since that time?

A. Mr. Fox moved recently but Mr. Lewis now lives in it.

Q. Would you mind telling us how much rent you are receiving?

A. I am receiving $150 a month rent.

Q. Is this the same amount since first rented in July?

A. Yes." (TR 260-261.)

Now, resuming discussion of the Fourteenth Point, the Court did not find that there was no delivery of a deed of the real property from Ralph Thomas to Sylvia A. Henderson. On the contrary, the Court expressly found that after the completion of the construction of the building on the premises the deed was delivered to Sylvia A. Henderson and was thereafter, on the 4th day of August, 1948, recorded. (Finding of Fact XXIX, TR 86.)

This finding is in accord with all the evidence in the case.

Throughout the brief of appellants their counsel persists in the contention that there was an actual delivery of the deed to Sylvia A. Henderson on the date of its execution and this contention is wholly based upon the testimony of Audrey Cutting and on one answer made by her in response to a leading question in which the answer was virtually demanded, as appears in the extract from the testimony of Audrey Cutting heretofore quoted and which was as follows:

"Q. (by Mr. Butcher). And prior to the signing of this mortgage do you recall whether the deed was delivered to Sylvia Henderson or not?

A. Yes, but all the papers were left in escrow in the bank.

Q. Well, you answer my question. In the McCutcheon office was there a delivery made of the deed?

A. There was." (TR 420-421.)

On cross-examination, however, the witness, Cutting, testified as follows:

"Q. (by Mr. Grigsby). Mrs. Cutting, you said this deed was delivered to Sylvia in McCutcheon's office?

A. That deed was left in McCutcheon's office, yes.

Q. You said it was delivered to Sylvia in McCutcheon's office?

A. Well, from the first you have got this all twisted up, Mr. Grigsby. I said the deed was left in McCutcheon's office. The mortgage was left in McCutcheon's office; the note was left in McCutcheon's office and Mr. McCutcheon made arrangements with Mr. Thomas to leave the deed and the mortgage and the note in the Union Bank for collection.

Q. Then there was no delivery of the deed to Sylvia of the deed, is that right?

A. Well, it was signed. I don't know just what you mean by the word 'delivery', Mr. Grigsby.

Q. Was it handed her or you for her?

A. Well, Mr. McCutcheon was my attorney and I took it for granted it was delivered to her for it was delivered to him for safekeeping.

* * * * * * *

Q. And you didn't get that deed at all from the bank until you paid this note, did you—when you paid the balance of this note on July 1st, 1946, you got the deed out of the bank, didn't you?

A. Yes, sir." (TR 428-429.)

The witness, Cutting, had previously several times testified that she paid the note about the 1st of July and thereupon received the deed from the bank.

The record shows that Ralph R. Thomas was served with summons in the original actions on August 4, 1948. This was the date the deed was recorded. It is probable that upon being served with process in these suits he immediately contacted Audrey Cutting, received payment of the balance due on the note given for the purchase price of the property and that she thereupon recorded the deed. That conclusion seems to have been arrived at by the Court judging from its statement made in the oral opinion as follows:

> "In my opinion the deed was not delivered at the time it was executed and it was only delivered when it was released from the bank shortly before the 4th of August, if not on the 4th of August." (Sup. TR 583.)

As stated before in this brief, from all the testimony on this subject it is clearly apparent that there was no delivery of the deed between the vendor, Thomas, to Sylvia Henderson, or to Audrey Cutting for Sylvia Henderson, until the purchase price of the property had been paid in full and that whether or

not there was a mortgage, the deed, with or without an escrow agreement, was held by the bank until the balance of the purchase price was paid.

"A deed placed in escrow conveys no title."
*In re Chrisman,* 35 Fed. Sup. 293 (4).

"While a deed is in escrow there is no delivery and the legal title remained in the grantor."
*Surratt et al. v. Fire Ass'n of Philadelphia, et al.,* 43 Fed. (2d) 271;
21 *C. J.* 882;
*Calhoun County v. American Immigrant Co.,* 93 U.S. 124.

Space will not permit this brief to include certain other testimony of Audrey Cutting which utterly destroyed her credibility. Reference is made to her testimony concerning the preparation and posting of notices of non-responsibility for liens which she claimed she posted on the premises involved on May 1, 1948, on behalf of herself and her minor daughter, on advice of her attorney. (TR 350-353.)

She testified that she prepared these notices from a form which she found in a gutter sometime previous to May 1st. (TR 384-391.)

Later she retracted this statement about finding the form in the gutter and stated that she got the form from a real estate book (TR 433-435), that it was on account of fear of prosecution for practicing law that she stated that she found the form in the gutter (TR 436-437), and that it was on advice of

her counsel that she retracted this statement and told the truth about the matter. (TR 440-441.)

With reference to the posting of the notices, Audrey Cutting testified that she posted three of these notices on May 1, 1948, the first on a carpenter's tool box and two on certain lumber then on said property; that a last notice was saved and when the basement was completed it was posted on the middle support beam of the basement. (TR 351-352.)

It was proven beyond doubt that there was no lumber on the premises on the date Audrey Cutting claimed to have posted the notices and that there was no tool box on the premises for more than a week after she so claimed. Many witnesses were called on this subject and a reading of the entire testimony of Audrey Cutting and a careful scrutiny of all the testimony of Audrey Cutting contained in the Transcript of Record will be necessary to enable this Appellate Court to appreciate the reasons that led the trial Court to make the statement on pages 585, 586 of the Supplemental Transcript which concludes as follows:

> "The sum and substance of the testimony is that no notice was posted except possibly one in the basement. I arrive at the conclusion that one may have been posted in the basement only because another witness found a copy of the notice, which was introduced in evidence, in the basement after he moved in as a tenant of the building."

Appellees contend that regardless of any presumptions which may arise from the execution of a deed as to its delivery and even, for the purposes of argument, admitting that "the presumption of delivery by virtue of the deed placed the burden of proving nondelivery on the plaintiffs" as stated on page 56 of appellants' brief, they have met the burden of proving nondelivery of the deed until after the completion of the construction of the building on the premises and have justified the finding of the Court on that subject of which counsel complains.

As to the Fifteenth Point raised, that the trial Court erred in finding against the evidence that Sylvia A. Henderson did not execute a mortgage to Ralph Thomas of said real property, there was no such finding made by the Court.

The Court in its oral opinion, rendered March 4, 1949, expresses an opinion on this subject and stated with reference to the mortgage:

> "While no particular point was made of it there is at least grave doubt as to whether Sylvia Henderson ever executed any mortgage in favor of Ralph R. Thomas. The original mortgage was not produced in court. It was never recorded. All that was produced in court is what a witness claimed to be a copy of it." (Sup. TR 583-584.)

The witness who produced the copy referred to by the Court was Audrey Cutting. The above expression of the Court indicates the conclusion arrived at by the Court as to the credibility of that witness.

As to the execution of a mortgage, there is no proof whatever of such execution except the testimony of Audrey Cutting. There was no finding of the Court on that subject. No error can be assigned on the Court's expression of opinion heretofore quoted with reference thereto and therefore, no further discussion of the subject is necessary.

It may be remarked, however, that if there was a mortgage it is strange that the same disappeared.

It will be noted that Audrey Cutting signed the note to secure the mortgage which is claimed by her to have been given. It is not contended by appellants that she signed the mortgage and it appears that the purported copy of the mortgage was dated several days prior to the date of the note, and it may be that in the course of the negotiations it was concluded by the attorneys in charge thereof that a mortgage signed by a minor would be no security for the payment of her note, not even as much as the co-signing of the note by Audrey Cutting, which was done. At any rate, the note and deed were placed in escrow at the bank and, as stated by Audrey Cutting herself, delivered to her when the note was paid.

ELEVENTH POINT RAISED. That the trial Court erred in rendering judgment against the real property of Sylvia A. Henderson when the said Sylvia A. Henderson had not been served personally or constructively with summons in accordance with the laws of Alaska.

Counsel prefaces his argument on the Eleventh Point raised by stating that Sylvia A. Henderson was not made a party to the original Complaints Nos. A-5087 and A-5088.

This is true. These actions were commenced on July 24, 1948 before the deed to Sylvia A. Henderson was recorded which was August 4, 1948, and there was no reason on the part of the lien claimants to make Sylvia A. Henderson a party. They were not concerned with secret equities.

In accordance with the authorities cited in connection with the Eighth Point raised and heretofore argued, Sylvia A. Henderson had no interest in the premises involved by virtue of an unrecorded deed as against the lien claimants, to the amount of their liens, at the time they were acquired.

Under the provisions of the Third Subdivision of ACLA, 1949, Sec. 26-1-13, heretofore quoted in full, in all actions to enforce any lien created by this chapter all persons personally liable and all lien holders whose claims have been filed and recorded shall be made parties, and all other persons interested in the matter in controversy or in the property sought to be charged with the lien may be made parties but such as are not parties shall not be bound by such proceedings.

Under this section Sylvia A. Henderson was not a necessary party.

That as has been shown in the discussion of the Eighth Point, Sylvia A. Henderson had no prop-

erty rights in the premises on which the liens were foreclosed as against the lien claimants to the amount of their liens, at the time they were acquired.

As to her having been served personally or constructively with summons and as to her being a party to the action, the brief of counsel does not state the true situation on pages 35 and 36 of his brief.

On page 36 thereof it is stated with reference to the intervention of the Anchorage Sand and Gravel Company:

> "That the Order Granting Leave to Intervene gave authority to list, among other parties defendant, 'and Sylvia A. Henderson, a minor, who have interest in the subject matter to be determined by the Court in the case of Ray Bullerdick, et al.'." (TR 149, lines 10, 11, 12.)

This is an incorrect statement. The order referred to is that certain named persons, partnerships, and corporations; and Sylvia A. Henderson, a minor, who have an interest, in the subject matter to be determined by the Court in the cases of Ray Bullerdick, et al.,

> "May intervene and file their Complaint in Intervention within three days from the signing of this Order, namely three days from the 9th day of November, 1948 upon the intervenors first serving a copy of their Complaint in Intervention and/or a copy of the Summons and Complaint upon the other interested parties aforesaid in said causes of action and filing the same on or before the 12th day of November, 1948." (TR 561.)

There was no order ever made by the Court, at least until the 16th day of February, 1949, making Sylvia A. Henderson a party defendant or directing or permitting any intervenor to make her a party defendant. The most that the Court directed with reference to Sylvia A. Henderson was that she might intervene.

She did not intervene and did not appear in any case except in pleadings filed by Audrey Cutting assuming to answer on her behalf and by the assumption of authority by the counsel for appellants to appear for Sylvia A. Henderson in that behalf even to the extent of verifying the amended answer to complaint in intervention filed the 8th day of February, 1949 and verified January 30, 1949, the first paragraph of which amended answer is as follows:

> "Comes now the defendant, Audrey Cutting and answering for herself and on behalf of her minor daughter, Sylvia A. Henderson, admits, denies and alleges as follows:"

and in which the affirmative defense contains the following:

> "That the defendant, Audrey Cutting *for herself* and on behalf of Sylvia A. Henderson, a minor, entered into a contract with a licensed contractor, one Russell W. Smith, etc." (Italics ours.)

And in the second amended answer filed February 14, 1949, the first paragraph is:

> "Come now the defendants, Audrey Cutting and Sylvia A. Henderson, and for their Second Amended Answer admit, deny and allege as follows."

And in which the affirmative defense recites:

> "That the defendant, Audrey Cutting, is neither guardian nor agent for the defendant, Sylvia A. Henderson and that the defendant, Sylvia A. Henderson, is the sole owner of Lot 2 in Block 37-D as aforementioned."

in which the counsel for appellants again assumes to act as attorney for the defendants.

And even after the case was tried and after counsel for the appellants had disavowed any authority to appear for Sylvia A. Henderson, he, on the 18th day of February, 1949, caused a third amended answer to be filed on behalf of the defendants, Audrey Cutting and Sylvia A. Henderson, reiterating the allegations set forth in the second amended answer.

With reference to the original cases, Nos. A-5087 and A-5088, the complaints, as stated before, were filed on July 24, 1948 before the deed to Sylvia A. Henderson was recorded and before the plaintiffs had any reason to believe that she claimed an interest in the property. As to these plaintiffs, at least, Sylvia A. Henderson became a purchaser after the suit was filed, is bound by the judgment and was not a necessary party.

> "In the construction of registry acts the term 'purchaser' is usually taken in its technical legal

sense. It means a complete purchaser, or, in other words, one clothed with the legal title."

*Steele v. Spencer,* 1 Pet. 552, 559, 7 L. Ed. 259.

"A purchaser of property affected by a lien who became such after the building or improvement was commenced is a proper party to the action but one who became such after suit brought is bound by the judgment and need not be made a party."

36 *Am. Jur.* 157, Section 248, Mechanic's Liens;
*Whitney v. Higgins,* 70 Am. Dec. 748;
*Russell v. Grant,* 26 S.W. 958.

In other words, one who buys into a law suit while the same is pending is bound by the judgment, and the law cannot make any exception of a minor.

The lien claims of the plaintiffs in the original suit, A-5087 were filed on the 30th day of June, 1948 which was prior to the time Audrey Cutting claims to have paid for the property and received the deed.

In original case No. A-5088, the lien claims were filed on the 23rd of July, 1948 prior to the date the deed of Sylvia A. Henderson was filed for record.

Lien claim of the Ketchikan Spruce Mills was filed on the 20th day of July, 1948, also prior to the recording of the deed to Sylvia A. Henderson.

The lien claim of the Alaska Plumbing and Heating Company was filed on the 3rd day of August, 1948, also prior to the recording of said deed.

The lien claim of the Kennedy Hardware Company was filed for record on the 2nd day of August,

1948, also prior to the date of recording said deed.

> "A purchaser or incumbrancer of property upon which a mechanic's lien is filed is chargeable with notice thereof by virtue of the mechanic's lien statute itself without the filing of a notice of lis pendens. The enforcement of mechanic's liens should be favored by a liberal construction of the statute."
>
> *Empire Land and Canal Co. v. Engley,* 33 Pac. 153.

> "There are a few situations, however, in which even a bona fide purchaser or incumbrancer may be bound by the judgment even though the requirement of notice has not been complied with. This rule has been applied in respect to actions for the foreclosure of tax and mechanic's liens on the theory that notice of such proceedings must always be presumed."
>
> 24 *Am. Jur.* 383, Sec. 26.

It would appear from the foregoing authorities and from the difference in the situation of the respective lien claimants as to the time of the filing of their liens and commencing their suits, that whether or not Sylvia A. Henderson is bound by the judgment without having been served with summons, or made a party to the actions, depends upon the time of filing the liens and commencing the suits of the different claimants. At least with respect to the original claimants, and probably with respect to the intervenors, Ketchikan Spruce Mills, Alaska Plumbing and Heating Company, and Kennedy Hardware, she appears to be bound by the judg-

ment, and whether she is bound by the judgment as to all parties plaintiff depends upon the Appellate Court's view of the merits of the Twelfth and Thirteenth Points raised which logically should be discussed together.

TWELFTH POINT RAISED. That the trial Court erred in denying the motion to dismiss against Sylvia A. Henderson at the close of the trial on the ground that she was not made a party to the action by personal or constructive service of summons, and as an infant was not before the Court through a general guardian or guardian *ad litem*.

THIRTEENTH POINT RAISED. That the trial Court erred in appointing Audrey Cutting guardian *ad litem* at the close of the trial by its order *nunc pro tunc*.

The error assigned by the Thirteenth Point raised relates to the timeliness of the appointment of Audrey Cutting as guardian *ad litem* for the minor, Sylvia A. Henderson.

The argument of counsel for appellants does not relate to the error complained of, but entirely to the question of the right of the Court to appoint a guardian *ad litem* at all, where the infant has not been served with process, regardless of at what stage of the proceedings, the appoint is made.

Appellees contend and the authorities support the contention, that the question of timeliness is unimportant.

"Where it appears on the trial that one of several defendants is a minor the court may at such time in an order appoint a guardian ad litem nunc pro tunc."

*Seiden v. Reimer,* 180 N.Y.S. 345.

"The rule seems to be that a guardian ad litem may be appointed at anytime before verdict."

*Starr v. McNamara,* 182 N.Y.S. 746.

"Where the fact that defendant was a minor, but that defendant was not defended by a regular guardian or guardian ad litem, was not raised until defendant's motions for new trial and in arrest of judgment, and during hearing on those motions court appointed a guardian ad litem, and ordered that pleadings previously filed for defendant be adopted by the guardian ad litem, defendant was not entitled to a new trial because guardian ad litem was not sooner appointed.

"Delay in the appointment of a guardian ad litem for a minor neither deprives the court of jurisdiction nor constitutes reversible error, where there is no showing of prejudice resulting therefrom."

*Johnston v. Calvin,* 5 N.W. (2d) 840.

As to the right of the Court to appoint a guardian *ad litem* where the infant has not been served with process, the attention of this Court is called to Rule 17 of the Federal Rules of Civil Procedure, subdivision (c), which is as follows:

"Whenever an infant or incompetent has a representative, such as a general guardian, commit-

> tee, conservator, or other like judiciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such order as it deems proper for the protection of the infant or incompetent person."

These rules were not in effect in Alaska at the time this case was tried although they were put in effect by an Act of Congress of July 18, 1949, U.S.C. Title 48, Section 103a. These rules of Civil Procedure for the most part reflect what was already the law, or are an expression of what was already the inherent power of the Court, and not a departure therefrom.

The position of counsel for appellants is expressed on page 49 of his brief as follows:

> "Where an infant has not been served with process, a judgment or decree against him or affecting his interest is erroneous, and the appointment of a guardian ad litem, or an appearance or answer by said guardian, does not bring the infant before the court, so as to justify such judgment or decree."

In support of this proposition counsel cites *Bank of U. S. v. Ritchie,* 8 Pet. (U.S.) 128, 8 L. Ed. 890.

This case is carefully reviewed in *Sloane v. Martin,* 40 N.E. 217 as follows:

> "The first case which he cites is Bank v. Ritchie, 8 Pet. 128. That was a bill of review and a direct attack upon a judgment decreeing the sale of property in which infants had an interest. It did not appear that process had been served upon them. It did appear that a stranger had been appointed guardian ad litem, on the motion of counsel for the plaintiffs, without bringing the minors into court or issuing a commission for the purpose of making the appointment. As to that, Chief Justice Marshall said 'it is not error, but is calculated to awaken attention.' After pointing out other defects in the procedure he upholds the reversal of the decree citing many departures from correct usage, but never once intimating that the judgment was absolutely void for want of actual service of process upon the infants. It is inconceivable that so great a jurist should have overlooked such a defect if he so regarded it at all."

The court in *Sloane v. Martin* reviews many authorities on this question and distinguishes cases where a personal judgment is sought against the minor and cases in which the proceeding is in the nature of a proceeding in rem, wherein no personal judgment is sought, pointing out that in New York by force of an explicit statute in foreclosure actions service of the summons must precede the appointment of a guardian ad litem, but the court held, however, in *Sloane v. Martin* that:

> "In an action in a Federal Court in the nature of a suit in rem seeking to subject certain property, in which an infant is interested, to the payment of partnership debts, the appointment of a guardian ad litem for such infant, upon application of the mother, was sufficient to give the court jurisdiction without actual service upon the infant." (Syllabus.)

The above conclusion was arrived at largely by reason of the opinion of Chief Justice Marshall in the *Bank v. Ritchie* case which counsel for appellants cites to the contrary, and which seems to afford a basis for the Federal Rule of Civil Procedure above quoted.

In the case on appeal no personal judgment was rendered or sought against Sylvia A. Henderson, nor could have been, even had she been made a party to the original cases and all suits in intervention and served with process.

Appellees have conceded, in the argument on the Eleventh Point raised, that Sylvia A. Henderson was not made a party to this action, nor served with process, except in the replies filed by plaintiffs and intervenors in response to amended answers filed by the counsel for appellants in which he assumed to act as her attorney. If made a party at all it was by virtue of the action of the court on February 16, 1950, the last day of the trial. At that time counsel for appellants disclaimed authority to act as attorney for Sylvia Henderson (TR 559-562) and at the same time assumed the authority to move the dis-

missal of the actions as against Sylvia Henderson. His authority even to make the motion is not disclosed.

Counsel contended that any judgment rendered by the Court could have no possible effect upon Sylvia Henderson.

Thus, in one breath, counsel contends that Sylvia Henderson is not a party and that he is not her attorney and in the next breath moves to dismiss an action against a person whom he contends is not a party and whom he has no authority to represent. How error can be assigned on the refusal of the Court to dismiss as against a party who has not been made a party and on motion of counsel who disclaims any authority to represent the party, is beyond our comprehension. However, at this juncture the Court made the order appointing Audrey Cutting as guardian ad litem for Sylvia Henderson and amending the pleadings to conform with that order and bring Sylvia Henderson into Court. (TR 561.)

If this was a void order, as contended by counsel for appellants, it could have no possible effect, and the situation would be the same as if Sylvia Henderson had never been mentioned in any of plaintiffs' or intervenors' pleadings.

Appellants' Brief is not clear as to whether it is contended that the judgment in this case is void or voidable. Counsel does contend, however, that the infant, Sylvia Henderson, was not made a party and that she is not bound by the judgment (Appellants'

Brief 46) and that the order of the Court was ineffective and of no legal significance.

In other words, counsel contends that the judgment is a nullity as to Sylvia Henderson. Nevertheless, he has appealed from the judgment, although his authority to take an appeal on behalf of Sylvia Henderson has not been revealed. If he is correct in his contentions, then the appeal on behalf of Sylvia Henderson was not necessary, her rights have not been affected by the judgment, and can be asserted in any proper proceeding. There is no occasion for a reversal of the judgment as to Sylvia Henderson.

The extent to which she is bound by the judgment as stated in appellees' argument on the Eleventh Point will depend upon the different situations of the various plaintiffs and intervenors and can be determined when, if ever, the judgment is attacked.

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## CONCLUSION.

A review of the testimony of the defense in this case, which consists almost entirely of the testimony of Audrey Cutting, may occasion some question in the mind of the Appellate Court as to who is the real party in interest in this action.

Audrey Cutting, in her sworn answers to the original complaints, and by reference thereto in all her other pleadings, alleged ownership in herself of the premises in controversy. She did not abandon this

position in her pleadings until her amended answer of February 14, 1949 was filed. She testified that in contracting for the construction of the residence she represented herself and her minor daughter, that for the purposes of the construction she was at that time what is considered the owner of the property, and she held herself out to various materialmen as such owner. In an answer filed February 8, 1949 she alleges that she contracted for the erection of the residence on behalf of herself and minor daughter.

On February 10, 1949 she testified that as guardian for her minor daughter she was advertising for sale the premises involved in this action and that prior thereto she had been appointed guardian for that purpose, which was the fact. Later, in response to examination by her counsel, she retracted this statement and stated that the proceeding for the appointment of guardian had not been completed, which was not the fact.

Referring to the contract for the purchase of the premises between herself and Ralph R. Thomas, which she later stated did not exist, she testified that she was not sure whether she had signed the contract or her daughter had signed the contract, that she was not certain whether or not she was a party to the contract of purchase or whether or not Sylvia Henderson was a party to that contract; that the deed was made to Sylvia Henderson; that there was a deed prepared from Ralph Thomas to her, of which she was certain. (TR 389-390.)

Whether or not Sylvia Henderson became a bona fide grantee by virtue of the deed purporting to be executed November 30, 1946 and recorded August 4, 1948 or whether or not she was simply being used as a "dummy" by Audrey Cutting for business convenience or, perhaps for the purpose of bringing about the situation which resulted, is a matter not susceptible of proof but open to conjecture and suspicion.

Throughout the Brief of Appellants Audrey Cutting is pictured as a devoted parent, seeking to establish a fund for the support and education of her minor daughter by the purchase of real estate and the improvement thereof for the purpose of deriving a substantial income therefrom. The purpose was commendable and became an accomplished fact to the extent that at the time of the trial she had possession of the premises and had received an income from rental to the amount of $150.00 per month for the period of eight months. Thus, she got back the greater portion of her initial investment of $1800.00 (TR 260, 261) and presumably, in fact did, continue to receive that income for some time thereafter, the judgment of the Court having been rendered on April 8, 1949 and the sale having taken place sometime later.

Audrey Cutting made a contract to pay $9800.00 for the construction of the residence; she admitted an obligation of $200.00 additional or $10,000.00 altogether, but never paid, offered to pay or tendered

any part of this obligation, on the flimsy excuse that the contractor demanded $13,500.00. This the contractor denied although admitting a demand for $10,500.00. (TR 260-261; 251, 347; 338, 344.)

There was no dispute except as to the extent of $500.00, and on account of this difference the contractor, Smith, was forced into bankruptcy.

Having been solely responsible for setting in motion a train of events which has resulted in the above situation Audrey Cutting now seeks by decision of this Court, not only to escape all personal responsibility, but to obtain title to this income bearing property for her daughter, free and clear of all encumbrances, and incidently to subject the lien claimants, laborers and materialmen to the payment of the considerable costs of this appeal.

The counsel for appellants seeks a reversal of the judgment herein, as to both defendants, on two grounds.

First. That his client, Audrey Cutting, has disowned the premises in controversy, and

Second. That he has himself disowned his other client, Sylvia Henderson.

As to Audrey Cutting, she is a proper party by the strict terms of the statute (Sec. 26-1-13, ACLA 1949.)

A judgment can be rendered against her under the provisions of Sec. 56-1-34, ACLA 1949.

Also the personal judgment against Audrey Cutting should be sustained, if for no other reason, because she should be considered estopped to disclaim ownership in the premises by reason of her representations.

The plaintiffs and intervenors have established that they performed labor and furnished materials to the extent of the liens claimed, that they filed liens substantially conforming to law to secure their claims, within the statutory time, and brought their actions within the time allowed by law.

Sylvia Henderson was represented at the trial, whether by legal authority or not, and represented by counsel selected by her mother who fought diligently to protect her interests. In fact there was no possible conflict between the interests of Sylvia Henderson and her parent, Audrey Cutting, both being identical, and the interests of Sylvia Henderson being the storm center of the law suit.

Even conceding the contentions of counsel for appellants, with relation to the interests of Sylvia Henderson in the premises foreclosed, to be well founded, it would only follow that Sylvia Henderson has not been in Court, no personal judgment has been rendered against her and whatever interest she has by virtue of the deed recorded August 4, 1948, need not be determined on this appeal, but can be adjudicated in any proper proceeding.

The judgment of the District Court should be sustained.

Dated, Anchorage, Alaska,
December 29, 1950.

Respectfully submitted,
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